

Criminal-Political Understanding of Article 297 of Criminal Code (CC-1): Hate Speech and Two Concepts of Liberty

Jan Stajnko, M.A., Assistant at Faculty of Law, University of Maribor, Doctoral Student at Faculty of Law, University of Ljubljana, Slovenia.

E-mail: jan.stajnko@um.si

Sedin Kičin, Local State Prosecutor at District State Prosecutor's Office in Ljubljana, Doctoral Student at Faculty of Law, University of Maribor, Slovenia.

E-mail: sedin.kicin@dt-rs.si

Luka Martin Tomažič, L.L.M., Researcher at Alma Mater Europaea - ECM, Slovenia. E-mail: luka.tomazic@almamater.si

This paper analyses the criminal act of public encouragement of hate, violence or intolerance, which is often referred to as hate speech in public discourse. A new methodological tool is proposed for such analysis to be performed, which is based on Berlin's Two concepts of liberty. A differentiation is made between positive and negative liberty, and both concepts are presented and discussed. It is claimed that individual legal rules exist on a spectrum between these two abstract extremes. An in-depth analysis of the criminal act of public encouragement of hate, violence or intolerance is then performed. It considers recent changes in Slovenian legislation and court practice, and the latest shift in the understanding of the researched criminal act is analyzed in light of the two concepts of freedom. Judgment I Ips 65803/2012 of the Supreme Court of the Republic of Slovenia seems to entail a step in the direction of the political value of positive freedom. The usefulness of the broader used methodological tool is emphasized. Its theoretical rigorousness is discussed considering Hart's, Dworkin's and Finnis' legal and political theories. Its usefulness is broad, as it could be used to analyze other legal norms in the broader field of punitive law. Its potential reaches to the areas of comparative analysis and in order to research the collision of values, which are hidden behind individual legal norms.

Keywords: hate speech, freedom of speech, Isaiah Berlin, liberty, Dworkin, Finnis

UDC: 343:342.727